

P R O C E E D I N G S

THE COURTROOM DEPUTY: This is Case Number CV 15-1759, Martinez v. Maricopa County Community College District, et al., before the Court for oral argument. Would the parties please announce for the record.

10:36AM

MR. ROBAINA: Good morning, Your Honor. Edmundo Robaina on behalf of Cleopatria Martinez.

MR. UPPAL: Your Honor, good morning. Pavneet Singh Uppal of Fisher & Phillips for the defendants. With me is my colleague, Shannon Balch.

10:37AM

THE COURT: All right. Good morning, counsel. I will hear whatever you want to talk about but first I have some questions.

Mr. Robaina, have you pleaded a claim under state law?

MR. ROBAINA: No, sir.

10:37AM

THE COURT: So you have only pleaded the federal due process claim, correct?

MR. ROBAINA: Correct.

THE COURT: I'm not suggesting this, but I want to make it clear, are you arguing that it's a violation of federal due process of law to fail to follow state procedural law? I don't think you are, but if you are, tell me.

10:38AM

MR. ROBAINA: No, sir. I'm --

THE COURT: All right. Now, the federal due process inquiry goes to the adequacy and fairness of the procedure in

10:38AM

1 light of the particular issue in inquiry, and it's a flexible
2 set of standards. And I, again, I think I know the answer to
3 this, but with respect to your claim of deprivation of property
4 in violation of federal due process of law, let me take it a
5 step at a time. With respect to the dismissal proceedings,
6 what procedure or process was missing that is necessary for a
7 minimally adequate federal due process of law?

10:39AM

8 MR. ROBAINA: In the dismissal proceeding, nothing.

9 THE COURT: Okay. Now, with respect to the suspension
10 proceeding, what procedure or procedures was missing that is
11 necessary to federally minimally adequate due process of law?

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12 MR. ROBAINA: There's -- I can answer that in three
13 ways.

14 THE COURT: Why don't you come up to the podium.

15 MR. ROBAINA: Your Honor, the provision in the
16 residential faculty policies basically allows the chancellor --

10:39AM

17 THE COURT: Do me a favor. Give me a checklist, then
18 you can go back and explain it. What procedures were missing
19 that federal due process of law requires as a constitutional
20 minimum for the context of this inquiry?

10:40AM

21 MR. ROBAINA: The procedure itself has no appeal
22 right. It also requires federal due process.

23 THE COURT: What's the first one? No appeal right,
24 what, to the Board?

25 MR. ROBAINA: No appeal right to the Board.

10:40AM

1 THE COURT: What else?

2 MR. ROBAINA: It also, federal due process requires a
3 fair and neutral arbiter.

4 THE COURT: What else?

5 MR. ROBAINA: If the process that was done in this
6 case were allowed, that means that the disciplinary procedure
7 for terminations would be rendered meaningless because in this
8 case, the chancellor, the hearing committee made a binding
9 finding of fact and law on this case and recommended to the
10 Board that the -- Dr. Martinez not be terminated.

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10:41AM

11 THE COURT: And the chancellor accepted the finding
12 and accepted the recommendation?

13 MR. ROBAINA: Correct, and could have requested to the
14 board that a suspension be given to Dr. Martinez.

15 THE COURT: In that proceeding?

10:41AM

16 MR. ROBAINA: In that proceeding.

17 THE COURT: Actually, if you look at the actual text
18 of -- I'm going to -- it's the faculty policy but I'm used to
19 calling it rules and regulations, 3.15 says that if the
20 chancellor had taken it further, the Board would, quote, hear
21 arguments regarding the chancellor's and the hearing
22 committee's recommendation regarding dismissal.

10:41AM

23 MR. ROBAINA: Understood.

24 THE COURT: And then it says the Board, quote, shall
25 render a final decision regarding retention or dismissal.

10:42AM

1 That's what it says.

2 MR. ROBAINA: Yes, sir.

3 THE COURT: Where does it say that if the chancellor
4 wishes to pursue a lesser discipline he has to proceed -- make
5 a recommended -- make that recommendation and has to do it
6 within the dismissal proceeding? Where does it say that?
7 Because I find it nowhere in any text.

10:42AM

8 MR. ROBAINA: It doesn't say it. In deposition I
9 asked Chancellor Glasper, could you have, in that proceeding,
10 requested that the Board suspend Dr. Martinez instead of
11 terminate her? And he said that yes, he could have.

10:42AM

12 THE COURT: So what? How is that a violation of
13 federal due process of law?

14 MR. ROBAINA: That is not a violation of federal due
15 process of law. But what I'm saying is he could have requested
16 it but instead he did not.

10:42AM

17 THE COURT: So what?

18 MR. ROBAINA: He used a procedure.

19 THE COURT: How does federal due process of law
20 require him to pursue a review and dismissal proceeding that
21 the text of the regulation does not require, actually
22 doesn't -- I mean, it doesn't say he could do it but he could
23 ask for anything. Why does federal due processes of law
24 require him to do what the regulation itself does not require
25 him to do? And if federal due process did require him to do

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1 it, how would that violate due process of law? That's just a
2 violation of state law.

3 MR. ROBAINA: Judge, let me explain.

4 THE COURT: Go right ahead.

5 MR. ROBAINA: If I may. The state law gives you a
6 property interest --

7 THE COURT: I know that. We're beyond that.

8 MR. ROBAINA: Okay. But the state law is not the
9 final say on whether or not it violates federal due process.
10 Federal due process requires a fair and impartial hearing.

11 THE COURT: Right now I'm talking about your third
12 point, so let's not slip around. All right?

13 MR. ROBAINA: Okay.

14 THE COURT: Your third point was even though the
15 regulations do not require him to make any recommendation for
16 approval of the Board for lesser discipline, somehow that I
17 have not been able to figure out, it violates federal due
18 process of law for him not to do what state law does not
19 require him to do.

20 MR. ROBAINA: No. It doesn't violate federal due
21 process for him not to request the suspension, but it violates
22 federal due process for him to suspend her.

23 THE COURT: That's like saying I prefer to win my
24 lawsuit. I need more explanation than that.

25 MR. ROBAINA: Because he is a party to the case and

1 the disciplinary --

2 THE COURT: Three different things. I'm talking about
3 three different things. Let's not slip around between the
4 three. The third thing I'm talking about now is your assertion
5 that because somehow because he said he could have asked the
6 Board for approval of lesser discipline the federal
7 constitution steps in and requires him to do that even though
8 the text of the state procedure does not require it. Explain
9 that to me, and don't slip around to neutral arbitrators and no
10 appeal to the Board. That's from the suspension proceeding.

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11 MR. ROBAINA: Well, I let me be clear. The fact that
12 he does not request the Board to suspend her is not a violation
13 of due process in itself.

14 THE COURT: Okay. Thank you. I think we have
15 narrowed our discussion down because in your brief, you did
16 acknowledge that when we're discussing liberty and property in
17 the termination proceeding, there was no deprivation of liberty
18 in violation of due process law. Now you are acknowledging
19 there was no deprivation of property either in violation of
20 federal due process law for that third reason. You have your
21 first two reasons, but for that third reason the chancellor did
22 not seek or make a recommendation to seek approval of the
23 Board.

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24 So I think I'm going to hold you to that concession.
25 Let's go back to your other two arguments. One is there's no

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1 appeal to the Board and neutral arbitrator. Tell me about your
2 argument about -- with respect to the suspension, it is clear
3 in the state procedure there is no right to appeal to the
4 board. There was -- more concretely, there is no need for
5 board approval for that discipline or any discipline short of
6 termination. It doesn't require it.

10:46AM

7 How is that a denial of federal due process of law
8 when you had a decision making process, an inquiry where the
9 chancellor adopted the full and rich procedures of the
10 termination commission and adopted their finding of fact that
11 she was insubordinate? How is it that one has a federal due
12 process right to have the board necessarily approve that
13 suspension? Now, I understand that even though the board
14 didn't have to look at that, didn't have to approve it, she
15 could ask the board to step in. That's different. I want to
16 know how there is a federal due process right to have the board
17 ratify her suspension decision.

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18 MR. ROBAINA: Because the rules themselves, the
19 faculty rules, provide that all discipline, including
20 suspensions, terminations, have to have just cause.

10:47AM

21 THE COURT: That's different.

22 MR. ROBAINA: No, sir.

23 THE COURT: If you want to talk about just cause,
24 there is nothing in your briefing about lack of just cause.
25 That's a substantive issue, and your client acknowledged she

10:47AM

1 regretted having not complied with the order so there's no
2 briefing here about lack of just cause. Your argument is
3 solely that there was not constitutionally minimally adequate
4 procedure.

5 MR. ROBAINA: If I may, because of the just cause
6 requirement, she has a property interest.

10:48AM

7 THE COURT: I have already told you we're past that.
8 You don't have to talk about that.

9 MR. ROBAINA: The property interest in her employment
10 means that she has to have adequate due process of law. Due
11 process requires, for the suspension as well as the
12 termination, a pre-disciplinary hearing.

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13 THE COURT: That was done. All this was done.

14 MR. ROBAINA: It was done but it also requires that
15 she go to a neutral arbiter of the decision.

10:48AM

16 THE COURT: No. No. Don't slip around. We're
17 talking about your due process argument that she has a federal
18 right to approval by the Board. That's different from your
19 argument about neutral decision makers. So don't slip around
20 between issues. I'm talking about your claim of a federal
21 constitutional right to have the Board review and approve her
22 suspension. I'm trying to understand what that is, and I
23 haven't heard anything yet. You did slip in to say, well, they
24 have to have cause. But there's no challenge in this, in your
25 briefs, to the cause for -- actually it's just a challenge to

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1 the adequacy of the process. I have read the briefs. There's
2 nothing in there and in any of this. It's completely obvious
3 that there was cause for discipline because she was
4 insubordinate as found by the finding decision of the hearing
5 committee in the prior proceeding.

10:49AM

6 So tell me how cause is even an issue here when you
7 didn't plead it and you didn't brief it.

8 MR. ROBAINA: All I meant to suggest with that, Your
9 Honor, was that because of the cause she has a property
10 interest.

10:49AM

11 THE COURT: I told you three times we're past that. I
12 understand that. Move on. We're talking now about the
13 procedure.

14 MR. ROBAINA: The final determiner must be someone who
15 is independent.

10:50AM

16 THE COURT: I'm not going there. You keep slipping
17 around. Are we in agreement now that there is, in fact, upon
18 further reflection, no federal constitutional due process right
19 to have the suspension reviewed and approved by the Board? Is
20 that past us now? Are you acknowledging that, too?

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21 MR. ROBAINA: There is a -- if it's not the Board then
22 I don't know who else in that situation could be the neutral
23 arbiter.

24 THE COURT: I'm not talking about neutral arbiter. I
25 will come to that third. Don't slip around. Your brief, and I

10:50AM

1 thought you were saying, that because she didn't get -- because
2 the state procedure did not require board approval for the
3 discipline somehow it violates due process of law for that to
4 be done at the chancellor level.

5 MR. ROBAINA: Because the state procedure does not
6 require any review that violates due process of law.

10:51AM

7 THE COURT: Well, let's focus on that. A decision was
8 made, first of all, here, the chancellor was drawing upon the
9 prior proceedings that were richly adequate and fair with
10 respect to termination in which they found that she was guilty
11 of insubordination and the commissioner -- the chancellor
12 accepted that. He gave her the further notice. She had her
13 chance to talk with her. She had a chance to talk with other
14 people. She had her chance to be heard by them. I think
15 didn't she go and talk to the general counsel, too?

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16 MR. ROBAINA: To the vice chancellor.

17 THE COURT: Vice-chancellor. They all heard her
18 argument. And it appears to me there's nothing in this brief
19 that suggests her argument was I didn't do that. I was not
20 insubordinate. Her argument was don't give me this discipline.
21 It's a discretionary matter. Give me less or don't give me
22 anything. That's different from saying I wasn't insubordinate.
23 It's the difference in me saying the light was green when I
24 entered the intersection as opposed to saying the light was red
25 when I entered the intersection. Nowhere in your briefs does

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1 she dispute she was insubordinate. If there is, I will give
2 you a minute to look at the briefs and point it out to me where
3 it is.

4 So they had procedure. The adopted procedure, the
5 suspension or the termination commission was imminently fair 10:52AM
6 and adequate. By the way, due process does not require that
7 decisions be right. They have to be fair and adequate. They
8 don't have to be right. And so she talked to people. She had
9 the chance to talk further. The chancellor decided, okay, I
10 have heard you. Other people have heard you. You haven't 10:52AM
11 changed my mind. Why is that not minimally adequate federal
12 due process of law without review higher up?

13 MR. ROBAINA: Because the other people that she spoke
14 with could not change the chancellor's decision.

15 THE COURT: But there is utterly contrary -- there's 10:53AM
16 no basis whatever in federal due process law. You understand
17 in the early days of the Republic in the 19th Century, federal
18 courts, in criminal cases, when they imposed sentence,
19 including death, there was no right to appeal. That passed
20 muster. 10:53AM

21 So I'm challenging you to tell me where is it, if the
22 process is fair and adequate, you have to have a higher appeal.
23 I'm not aware of any such principle in federal constitutional
24 law and I challenge you to give me any case that says that.

25 MR. ROBAINA: That you have to have a higher appeal? 10:54AM

1 THE COURT: Yes. Take a minute if you want to look at
2 your brief. It's nowhere in your briefs. It's nowhere in
3 federal constitutional law, either.

4 MR. ROBAINA: What I can say is the federal
5 constitutional law requires the part that they gave her, the 10:54AM
6 meetings with Dr. Solley, the meetings, the pre-disciplinary
7 meetings, that's the first half of due process requirements.
8 The second half of due process requirement requires a hearing,
9 a full evidentiary hearing with a neutral arbiter.

10 THE COURT: No, it doesn't. Well, first it doesn't 10:54AM
11 require -- you know, if you want extreme end of the spectrum
12 the Supreme Court has held that we have frequent issues about
13 prisoner's discipline. And all the due process requires when a
14 prisoner is disciplined is for the prison official to listen to
15 him, hear him say he didn't do it. That's all that's required. 10:55AM
16 The measure of procedure is flexible and depends on what's
17 there, and the notion that you have to have a full hearing --
18 by the way, in this case, the chancellor went by the full
19 evidentiary hearing that found that she was insubordinate and
20 you have already told me there was nothing constitutionally 10:55AM
21 inadequate about that procedure or that binding finding. So I
22 challenge you to tell me how it is that she is entitled to a
23 second hearing when the first hearing was fully adequate and
24 went against her as to that finding.

25 And frankly, even disciplinary matters don't -- you 10:55AM

1 know, educational institutions and government bodies, they
2 often do have these full blown procedures for employee
3 discipline. They are not constitutionally required. Private
4 employers don't have to do that. Now, actually, it's a bad
5 analogy because private employers usually are not subject to
6 due process. But the question is what procedure is needed and
7 I challenge you to give me any authority that says that a full
8 blown evidentiary hearing as opposed to talking it through,
9 hearing, taking a look at what there was is constitutionally
10 required much less as required twice. Tell me.

10:56AM

10:56AM

11 MR. ROBAINA: I believe the *Loudermill* case says that
12 in a termination hearing of an employee you have to have both
13 pre-disciplinary, minimal pre-disciplinary hearings as well as
14 a full blown post-disciplinary hearing.

15 THE COURT: I may not be remembering that case but
16 what I do remember from your briefs is that in the usual or the
17 common situation where there's immediate discipline, it's
18 enough to give notice up front and post-disciplinary procedure
19 at the back end to see if you want to change your mind. That's
20 what I remember but I don't remember anything else.

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21 MR. ROBAINA: The *Walker* case, Your Honor, also says
22 that a pre-disciplinary hearing need not be a full adversarial
23 hearing, and the failure to provide an impartial decision-maker
24 at the pre-disciplinary stage need not create liability so long
25 as the employee is provided a full hearing and --

10:57AM

1 THE COURT: See, now you are slipping around again.
2 You keep slipping around to impartial decision maker. We're
3 going to talk about that later. Right now I'm trying to figure
4 out why due process requires, even with a neutral decision
5 maker, how does due process require a full evidentiary hearing 10:58AM
6 for employee discipline as opposed to informal procedures, talk
7 to the employee, look into what happened, talking to the other
8 faculty member, looking at the records of what happened, the
9 employee's own acknowledgement she had not refunded the money
10 that she had been ordered to do. Why does due process require 10:58AM
11 more than that?

12 MR. ROBAINA: It does, Your Honor, absolutely.

13 THE COURT: Give me a case.

14 MR. ROBAINA: *Loudermill, Walker, Clements* case, which
15 is also cited in my brief, *Clements versus Airport Authority*, 10:58AM
16 69 F.3d 321.

17 THE COURT: If they are in your brief I have looked at
18 them and you don't need to give me the cites again.

19 All right. Now, she had that here. She had a full
20 blown evidentiary hearing with witnesses, findings of fact by a 10:58AM
21 neutral panel that found that she had been insubordinate, that
22 was, under that procedure, deemed to be binding. But even if
23 it's not deemed to be binding, the chancellor drew upon it.
24 How is it that she's entitled to a second full blown
25 evidentiary hearing to overturn the first one under federal due 10:59AM

1 process of law? That you give me no example of.

2 MR. ROBAINA: It's not that she's entitled to a full
3 evidentiary hearing. What she's entitled to -- I don't want to
4 antagonize you. It kind of bleeds into --

5 THE COURT: It's okay. I get animated. You can get
6 animated, too. 10:59AM

7 MR. ROBAINA: They bleed into each other. What she's
8 entitled to is a neutral arbiter.

9 THE COURT: We'll talk about that in a minute. You
10 don't get to slip around from one thought to another. 10:59AM

11 MR. ROBAINA: She's not entitled necessarily to a
12 second hearing. It's not necessary because there were binding
13 findings of fact and conclusions of law in the first hearing.
14 And as you have said earlier, it's a -- the due process is not
15 a sort of a stagnant thing. You can look at it. So I'm not
16 suggesting she needs a second hearing. 11:00AM

17 THE COURT: I hold you to that concession.

18 MR. ROBAINA: Okay.

19 THE COURT: That's passed us. You have acknowledged
20 that. That's no longer an issue. The third issue is there was
21 a biased decision maker. 11:00AM

22 MR. ROBAINA: My third issue is that she's entitled to
23 a neutral decision maker. She had a neutral decision maker
24 with respect to the findings of facts and conclusions of law.
25 But a neutral decision maker did not make the final decision 11:00AM

1 with regard to the discipline.

2 THE COURT: Well, the discretionary aspect of what
3 discipline to impose for the finding of misconduct.

4 MR. ROBAINA: But that, Your Honor, also requires a
5 neutral decision maker. It's not that because they found that
6 she did one of the three or four things that they allege that
7 now they get to impose whatever discipline they want. 11:00AM

8 THE COURT: Before we get into the merits of that,
9 let's go to the threshold, the background issue there. You did
10 not plead that in your complaint, and it's no issue here. It 11:01AM
11 was raised for the first time in the Motion for Summary
12 Judgment and, therefore, it's not properly before the Court. I
13 read your reply brief which you quoted the passages in your
14 claim you said raises -- they didn't come close to raising that
15 issue. 11:01AM

16 MR. ROBAINA: Okay.

17 THE COURT: So that is therefore not presented, it's
18 forfeited, and it's not a basis to overturn your case.

19 MR. ROBAINA: Okay. Then let's move to the second
20 reason. In the notice of suspension letter, they raised a new 11:01AM
21 issue.

22 THE COURT: Actually, hold on a minute. I did want to
23 explore further your argument that there was not a neutral
24 decision maker. It is, as you acknowledge, and I hold you to,
25 that is forfeited because it's not pleaded and therefore it's 11:02AM

1 not properly before the Court. However, let's address whether
2 there was any bias. Obviously, part of the problem is there is
3 no actual evidence of bias by this decision maker, nor was
4 there an opportunity for the other side to present evidence of
5 lack of bias because you didn't plead it. It wasn't part of
6 the lawsuit. But when you look at what's in your brief, I
7 don't see anything there other than saying, well, if you are
8 involved in a disciplinary proceeding once it's subject to
9 review by another independent group, as is very common in civil
10 service matters, you can't make the final decision because you
11 are automatically biased. That seems to be your argument.

11:02AM

11:02AM

12 MR. ROBAINA: That is not my argument, Your Honor.
13 It's not as if you are automatically biased if you are in the
14 same agency. That's the *Withrow* case. The Courts said it's
15 not automatic, but you look at the cases and you look at the
16 cases since *Withrow* and you see numerous cases, including a
17 case this year from the Arizona Supreme Court, that basically
18 says if you are involved in a decision to --

11:03AM

19 THE COURT: Which case is that?

20 MR. ROBAINA: It's *Horne v* --

11:03AM

21 THE COURT: I know that case. Has nothing to do with
22 this.

23 MR. ROBAINA: Well, if you are involved in the
24 decision to discipline.

25 THE COURT: Right.

11:03AM

1 MR. ROBAINA: You can't be the arbiter of your own
2 case.

3 THE COURT: That necessarily means that any supervisor
4 involved with employee direction or discipline is disqualified
5 from making the final decision if, in fact, there is a
6 procedure where other people, another body has authority to
7 make findings of fact and those Findings of Facts are accepted.
8 It's hard for me to see how this means anything except that.
9 There is automatic bias because you started the discipline
10 process. The employee invoked her right to have a neutral look
11 at it and then now can't come back to her. Somebody else has
12 to make the decision. Again, give me a case that holds that.
13 I have looked at the cases cited in your briefs and none of
14 them are factually on point.

11:03AM

11:04AM

15 MR. ROBAINA: Your Honor, what the cases hold is that
16 if you develop a will to win, that's one way, that's the type
17 of bias that the Courts don't want.

11:04AM

18 THE COURT: There's no such evidence here.

19 MR. ROBAINA: It's implied.

20 THE COURT: It's implied because it's automatic
21 because she started the process.

11:04AM

22 MR. ROBAINA: If you are involved in the investigation
23 and the prosecution of a case and you are also the adjudicator
24 of the case, that's also unfair and a problem. There are
25 numerous cases that say that.

11:04AM

1 THE COURT: So what you are saying then is that when
2 you have issues of underlying, let's call it tenure, the
3 federal due process prevents the person who initiated the
4 process or the discipline from making the final decision even
5 when that decision is identical to the decision of the
6 reviewing body that there was misconduct.

11:05AM

7 MR. ROBAINA: That's not -- but that's only one-half
8 of the equation, Your Honor. If they decided that there was
9 this much misconduct and then the other question is, what's the
10 reasonable punishment for it. And that's a decision that a
11 neutral arbiter has to make.

11:05AM

12 THE COURT: By the way, the record here is clear, the
13 chancellor talked with the hearing committee, and they told
14 them that dismissal was too hard but suspension without pay
15 would be okay. It is uncontroverted in the record.

11:05AM

16 MR. ROBAINA: That is incorrect, Your Honor. It is
17 controverted in the record. That's hearsay.

18 THE COURT: It's not controverted and it's not hearsay
19 because that's the present state of mind of those people
20 communicating to the commission what their state of mind was.
21 You could have looked into that. You could have taken
22 depositions. You could have gone in and said, did they say
23 that? You didn't do any of that.

11:06AM

24 So what we have here is the chancellor's statement of
25 his information about current state of mind, and that's not

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1 hearsay. In any event, you had the chance to controvert that
2 and you did not. Even apart from -- it's really not necessary
3 for the hearing committee to also say and we think this other
4 lesser discipline would be appropriate although they did. But
5 it's not necessary. The question is --

11:06AM

6 MR. ROBAINA: Your Honor, even the chancellor doesn't
7 claim that the hearing committee said that it would be a
8 14-month suspension.

9 THE COURT: Actually, I read what's there and it is
10 uncontroverted that they said an unpaid suspension would be
11 appropriate. Now, again, they don't have to have said that but
12 they did.

11:07AM

13 Go ahead. Now, actually, with respect to the neutral
14 arbiter, I guess your argument is the person who initiates
15 discipline can never be the one who finishes them. I looked at
16 all your cases. I will take another look.

11:07AM

17 MR. ROBAINA: I didn't say the person who initiates
18 can never be -- that's your words, Your Honor. I didn't say
19 the person who initiates can never be an arbiter. What I said
20 was that the person who is involved in basically in prosecuting
21 a case and in initiating a case, and is a party to the case,
22 cannot be the same person that decides the matter.

11:07AM

23 THE COURT: All right. Now, I think we covered the
24 three -- you listed your three federal due process
25 deficiencies. We have resolved that they are all either

11:08AM

1 withdrawn or with respect to the neutral arbitrator issue it
2 was not pleaded, therefore, it's foregone. You started to say
3 something else, a different issue. So I want to hear whatever
4 you have to say.

5 MR. ROBAINA: The other reason that's completely
6 inappropriate and unfair is because under the state
7 proceedings, under state law, the review that you get is what
8 they call substantial evidence review, which means that if
9 there's any evidence to support the factual findings of the
10 arbiter, basically, then the courts in the state proceedings
11 will --

12 THE COURT: I don't recall that in your briefs, but it
13 doesn't surprise me that that's consistent with my general
14 understanding of American Standards of Judicial Review of
15 Agency Action, a subject on which I wrote the book.

16 MR. ROBAINA: Which makes it very important that the
17 person that makes the decision does not have a potential bias.

18 THE COURT: No substantial evidence means that there's
19 any evidence that any reasonable trier of fact could believe
20 the reviewing -- well, it's often courts, the reviewing court
21 is bound by that decision.

22 MR. ROBAINA: Correct.

23 THE COURT: I'm not sure that would apply to this kind
24 of discipline by the Board. Well, actually, it would.

25 MR. ROBAINA: It would.

1 THE COURT: Because it says the finding is binding.
2 If it didn't have any evidence it could not be binding. So I
3 think you are right about that.

4 MR. ROBAINA: What that means, though, for due process
5 purposes is it really requires you to have a fair arbiter in 11:09AM
6 this thing. It can't be a party.

7 THE COURT: We have already covered that.

8 MR. ROBAINA: That's so clear in the law.

9 THE COURT: You started to mention something. I
10 interrupted you. So was there another issue that you are 11:09AM
11 arguing as a basis to win your lawsuit other than these three?

12 MR. ROBAINA: I want to go back to something, Your
13 Honor, because I don't mean to imply that I agree with your
14 premise that there's nothing in the complaint that she raised
15 these issues. I didn't file the complaint. I read the 11:10AM
16 complaint.

17 THE COURT: The amended complaint is the operative --

18 MR. ROBAINA: Amended complaint.

19 THE COURT: I have read every line you quoted in your
20 statement of facts for that, and nothing in there makes a claim 11:10AM
21 of unfair decision maker. It's just not there. Read me --
22 take a minute. We have all the time you need. Go through your
23 papers and read me the sentence or sentences in your complaint
24 that raises that issue.

25 MR. ROBAINA: "Notwithstanding the hearing committee's 11:11AM

1 unanimous conclusion that the district failed to satisfy its
2 burden of proof and that Dr. Martinez should be allowed to
3 continue her employment, Chancellor Glasper unilaterally
4 discontinued her employment by suspending Dr. Martinez's
5 employment on March 7, 2014, without pay for 14 and-a-half
6 months from March 1, 2014 to May 2015. Chancellor Glasper's
7 rejection of the hearing committee's factual finding" --

11:11AM

8 THE COURT: Don't read so fast.

9 MR. ROBAINA: I'm sorry.

10 THE COURT: I'm looking for the document.

11:11AM

11 MR. ROBAINA: Page 7.

12 THE COURT: What document number?

13 MR. ROBAINA: Page 7 of Document 88. I'm sorry. I
14 didn't mean to read so fast.

15 THE COURT: Part of the problem here is you all filed
16 cross -- simultaneous cross motions for summary judgment, which
17 is a gigantic waste of resources. But it also gets confusing.
18 So Document 88.

11:11AM

19 MR. ROBAINA: At Page 7.

20 THE COURT: It's your brief. I'm looking for language
21 in your amended complaint. I know in your brief you wanted to
22 have this issue decided.

11:12AM

23 MR. ROBAINA: It cites language from the amended
24 complaint.

25 THE COURT: Okay. Well, actually, I did -- hold on a

11:12AM

1 minute. Okay. That's where I read it. It's on Page 7 of your
2 brief. That's right.

3 So read me the language there that raises this issue
4 of biased decision maker.

5 MR. ROBAINA: Chancellor Gasper's -- Paragraph 30,
6 "Chancellor's Gasper's rejection of the hearing committee's
7 factual findings and unilateral imposition of a 14-month unpaid
8 suspension on Dr. Martinez violates the district's residential
9 faculty policies and flatly usurps the Board's ultimate
10 authority to discipline its employees."

11:13AM

11:13AM

11 THE COURT: Well, that's just a recitation of
12 procedure and an assertion of state law that says state law
13 requires the Board to prove that. In our earlier discussion,
14 you have acknowledged that's not correct and you are not making
15 that argument anymore.

11:13AM

16 MR. ROBAINA: Number 41, "Chancellor Gasper failed to
17 allow Dr. Martinez any opportunity to present evidence refuting
18 the new statement of charges before a neutral finder of fact."

19 THE COURT: Well, perhaps.

20 MR. ROBAINA: Page -- I'm sorry -- Paragraph 74 which
21 is on Page 8.

11:14AM

22 THE COURT: Oh. Wait a minute. I want to be clear.
23 It is undisputed that the evidence was presented before a
24 neutral finder of fact in the suspension proceedings, right?

25 MR. ROBAINA: But it also requires, Your Honor, due

11:14AM

1 process also requires not only that the evidence be presented
2 before a neutral finder of fact but that a neutral arbiter
3 decide the case, decide what the punishment is going to be.
4 That's not up to the person that's bringing the allegations
5 against an employee. That's not the way due process works.

11:14AM

6 THE COURT: I read 41 as a challenge, patently
7 factually incorrect challenge to the fairness of the --

8 MR. ROBAINA: Number 41 is factually incorrect?

9 THE COURT: Of the fairness and the neutrality of the
10 dismissal committee's findings. But now your argument is based
11 on the findings of sanctionable discipline, the discretion as
12 to what discipline to impose is adequately raised here because
13 here you are saying she wanted --

11:15AM

14 MR. ROBAINA: There's another piece of this. Oh, I
15 know what I was going to mention to you earlier that you
16 reminded me of.

11:15AM

17 In the statement of charges for the suspension,
18 there's a new allegation.

19 THE COURT: That's right. Put that on hold for a
20 minute. I want to finish this discussion.

11:15AM

21 MR. ROBAINA: Okay.

22 THE COURT: In Paragraph 41 you purport to challenge
23 the lack of, quote, "any opportunity to present evidence
24 refuting the new statement of charges," close quote, which is a
25 direct replay of the evidence and neutrality of the first

11:16AM

1 hearing committee. So if you are saying here, well, due
2 process requires that the chancellor have a redo of the same
3 procedure we earlier agreed, and you conceded -- it's not a
4 real concession because it's obvious -- that the prior fair and
5 neutral decision making about disciplinable conduct was fair 11:16AM
6 and neutral. And all you are saying here is she wanted to
7 present, quote, evidence refuting the statement of charge. The
8 statement of the charges is -- we'll get that here next. This
9 is the same stuff that was found binding the finding by the
10 hearing committee. 11:16AM

11 MR. ROBAINA: The statement of charges is also
12 discussing the new statement of charges I just mentioned to you
13 that has a new allegation.

14 THE COURT: Well, we can go to that. But before we
15 do, if this is what you are pointing to, this is an assertion 11:17AM
16 at most of the pleading that she had the right to present her
17 evidence all over again after having presented it to a fair and
18 neutral decision maker who found disciplinable misconduct. So
19 now the issue of the new charges, go ahead with that.

20 MR. ROBAINA: Let's -- can I finish this -- 11:17AM

21 THE COURT: Go ahead.

22 MR. ROBAINA: -- quickly? Remember, the pleadings,
23 this is not a requirement that she give her exposition on due
24 process in the pleadings. 72, "Chancellor Glasper's decision
25 to suspend Dr. Martinez without pay for 14 and-a-half months 11:17AM

1 violated the constitution of due process rights." And 74, "The
2 pertinent constitutional standards are longstanding, were
3 clearly established at the time of the suspension and included
4 a right to due process free of bias."

5 THE COURT: The closest you get to saying something 11:17AM
6 about neutral decision makers is Paragraph 41, but even that is
7 just challenging adequacy of fact finding what's already been
8 found by a fair and neutral decision.

9 MR. ROBAINA: What about a right of due process free
10 of bias? 11:18AM

11 THE COURT: Isn't that what --

12 MR. ROBAINA: In paragraph 74.

13 THE COURT: That gets closer, too. Still with respect
14 to what you have to plead --

15 MR. ROBAINA: Your Honor, the pleadings -- 11:18AM

16 THE COURT: You can't just throw out a bunch of stuff
17 with isolated references without identifying more specifically
18 what you are alleging.

19 MR. ROBAINA: Your Honor, the pleading itself, the
20 amended complaint goes throughout the facts. These are just -- 11:18AM
21 the issue was raised that she doesn't raise the issue of unfair
22 bias, so I tried to point out the paragraphs that lead to that
23 issue. But if you look at the amended complaint, yes, it does.

24 THE COURT: Under the pleading, it's not enough just
25 to plead a bare conclusion, any bare conclusion, including a 11:19AM

1 bare conclusion well, there was bias here. You have to plead
2 some minimal facts that makes that plausible to think that all
3 you have here is this is the person who initiated the
4 discipline.

5 MR. ROBAINA: Judge, it doesn't seem necessary to put 11:19AM
6 the entire complaint into the reply to their motion.

7 THE COURT: Well, I'm not talking about your reply.
8 I'm talking about your complaint.

9 MR. ROBAINA: In the complaint itself, it discusses
10 what happened. And you cannot -- and the bottom line is, 11:19AM
11 Judge, for due process, you can't have the same person decide
12 to terminate someone and then make the decision -- I'm sorry --
13 to discipline someone and then make the decision as to whether
14 or not that discipline was fair. That doesn't work for due
15 process under longstanding law. It's not -- I didn't -- 11:20AM

16 THE COURT: You know, another way to say this is this
17 sprawling complaint does not satisfy *Iqbal* and *Twombly*. It's
18 not just enough to throw a bunch of stuff out with conclusions
19 without facts that would suggest actual bias other than what I
20 think or thought you were arguing that it is inherently biased 11:20AM
21 in violation of due process. So, you know, the federal
22 pleading standards require more than that.

23 I labored through your complaint. That's why I came
24 out asking you these questions. Because there's a lot of
25 discussion in your complaint and in your briefs about state 11:20AM

1 procedures. But you acknowledged to me you are not pleading
2 any claim under state law, so that's behind us.

3 MR. ROBAINA: Judge, the pleading under state law, she
4 did not file an appeal of the decision to suspend her. She
5 didn't do that. She filed a due process violation saying that 11:21AM
6 the way they went about this and their process itself violates
7 due process.

8 THE COURT: Well, you know, again, you told me you
9 were not pleading any violations of state law so I thought that
10 was behind us. But -- and hold your other thought because I 11:21AM
11 don't want to cut anything off. If we get -- if we think that,
12 well, you know, if you draw a whole lot of inferences of things
13 that weren't pleaded or weren't argued that you have
14 acknowledged are not part of this lawsuit, and if you are
15 really saying, well, the state procedure does require action by 11:21AM
16 the Board to finalize any suspension of a year or however you
17 want to describe it, whatever your dividing line is, that's a
18 proposition of state law. That's not a proposition of federal
19 law. Right? And it's plainly wrong because the state
20 procedures in 3.13 lay out a procedure for suspension. 3.15 11:22AM
21 lays out a procedure for termination. And if you can't really
22 terminate without complying with 3.15 you made a dead letter
23 3.14 which is not frankly --

24 MR. ROBAINA: I think I now understand where you are
25 going, Judge, and if I may comment on that. The fact that the 11:22AM

1 state procedure lays out a process doesn't mean that that's the
2 end all be all with regard to the process. It has to comport
3 with federal due process requirements.

4 THE COURT: Yes, but what happened here unquestionably
5 did comport with the state procedure. The 3.15 procedure was 11:22AM
6 exhausted right through the point where the chancellor accepted
7 it, and the 3.13 process was richly exhausted as well. So when
8 you argue that, well, you really can't suspend someone for a
9 year because that's termination, that isn't defiance of the
10 plain language of 3.13 and 3.15. 11:23AM

11 MR. ROBAINA: That's the argument that -- I mean, it's
12 in the complaint. But --

13 THE COURT: You don't plead it as a cause of action
14 and you told me at the beginning here you are not pleading
15 anything as a state law cause of action. 11:23AM

16 MR. ROBAINA: I guess I don't -- I'm not trying to be
17 contradictory about this. What I'm saying is not that they
18 violated their own policy. What I'm saying is that their
19 policy violates the due process.

20 THE COURT: Okay. But we already exhausted the three 11:23AM
21 ways that might do that, and I think you have withdrawn a lot
22 of it.

23 MR. ROBAINA: Well --

24 THE COURT: First let's go back to, does the state
25 procedure require board approval for suspension of a year? 11:23AM

1 MR. ROBAINA: I will say the state procedure doesn't
2 although the chancellor testified in deposition --

3 THE COURT: Okay. So the state procedure doesn't
4 require it.

5 MR. ROBAINA: Correct.

11:24AM

6 THE COURT: So if we draw overly generous inferences
7 about what you might have pleaded, there was no violation of
8 state procedure here. Right?

9 MR. ROBAINA: Correct.

10 THE COURT: So how can federal due -- and I don't
11 assume you are not arguing --

11:24AM

12 MR. ROBAINA: Well, if I may, can I --

13 THE COURT: How is the federal -- well --

14 MR. ROBAINA: Let me correct that, Judge. The
15 procedure requires -- and hear me out for a second. The
16 procedure requires that in order to suspend someone you have to
17 have just cause. That requires that -- that means that they
18 have a property interest. When you have a property interest
19 now federal procedure --

11:24AM

20 THE COURT: I told you five times you have a property
21 interest. We don't need to talk about that anymore. There's
22 nothing here challenging the due cause for the discipline.
23 It's not in your brief. It's not in your complaint. And your
24 briefing also does not dispute the underlying facts about her
25 refusal to follow an instruction to refund the monies to the

11:24AM

11:25AM

1 students. There's a lot of briefing about, well, they didn't
2 prove that she violated the copyright law. She did violate the
3 instruction to refund the money.

4 MR. ROBAINA: That doesn't mean they can suspend her
5 for 14 months.

11:25AM

6 THE COURT: Why not?

7 MR. ROBAINA: Because --

8 THE COURT: It's a violation of 3. -- now I can't
9 remember.

10 MR. ROBAINA: Judge, they can't decide that is what
11 I'm saying to you. Chancellor Glasper cannot make the decision
12 there.

11:25AM

13 THE COURT: Stop. You are asserting that there was a
14 lack of just cause. That's what I'm talking about. And I
15 think I'm concluding there clearly was just cause and you
16 didn't even dispute the facts of the just cause. It's not in
17 your briefs. It's only procedural challenges in your briefs.

11:25AM

18 So when you tell me today, well, there's an underlying issue
19 here that they didn't really adequately prove or wasn't true
20 that there was just cause for termination, that is not in your
21 briefs. And when you say it here now it's too late. In any
22 event, it's plainly untrue. Disobeying a direct order from
23 administration to refund money to the students is
24 insubordination as the hearing committee found. And, by the
25 way, has she refunded that money even as of today?

11:26AM

11:26AM

1 MR. ROBAINA: Judge, I don't believe so. But I think
2 that that's not relevant.

3 THE COURT: The record shows that she had not refunded
4 the money as far as the proceedings went here, but it doesn't
5 speak to what happened after the proceedings here.

11:26AM

6 MR. ROBAINA: I mean, I think -- can I come back to
7 something?

8 THE COURT: You certainly may. Let me wrap up that
9 thought. The insubordination, the refusal to follow orders
10 apparently persists today, and -- it persists today. Anyway,
11 go ahead.

11:27AM

12 MR. ROBAINA: Judge, this is not a case to
13 determine -- today is not a case to determine whether or not
14 the imposition of the 14 months was necessarily just or unjust.
15 What it is is the decision as to whether or not the person that
16 accuses her can make that determination. That's what I'm
17 saying.

11:27AM

18 THE COURT: I'm trying to take your stuff one at a
19 time and you keep slipping around from what I'm asking you to
20 something else. I have taken almost an hour of your time. I
21 need to give Mr. -- who is going to argue for the other side?

11:27AM

22 MR. ROBAINA: Can we just hit the one last item?

23 THE COURT: Go ahead.

24 MR. ROBAINA: The fact is, Your Honor, that even if
25 you make that determination, there's another issue here. The

11:27AM

1 issue is that in the notice of suspension there's a new
2 allegation which she never got any opportunity in front of any
3 arbiter, not even Dr. Glasper to argue. It's a new allegation.

4 THE COURT: Let me help you out with that. Part of
5 this issue is some of these things are too elliptical. The
6 direct recommendation of finding of misconduct was the
7 insubordination of refusing to follow the orders to refund
8 money to students. And whether or not it was right, it was
9 insubordination.

11:28AM

10 This reference to the -- I don't remember the section
11 numbers now -- to the budgeting process is simply the predicate
12 for that. It's the same issue, same misconduct tracing it back
13 to the underlying predicate. It's not a different charge.

11:28AM

14 MR. ROBAINA: May I show you why it's a different
15 charge?

11:28AM

16 THE COURT: Go ahead.

17 MR. ROBAINA: The new allegation is that she violated
18 administrative Rule 1.12 and 1.12.6. And the factual
19 allegation is that Phoenix College determined that your course
20 materials charge was not included in the adopted budget or
21 pre-approved by the governing board. That's not --

11:29AM

22 THE COURT: I don't have that here. What was 1.6
23 again? 1.12.

24 MR. ROBAINA: 1.12.2, authorization, and 1.12.6, fees.
25 And the actual allegation, this is in statement of fact --

11:29AM

1 plaintiff's statement of fact 43. The actual allegation is
2 that Phoenix College determined that your course materials
3 charge was not included in the adopted budget or pre-approved
4 by the governing board. That's not an allegation in the
5 state --

11:29AM

6 THE COURT: 1.12.6.

7 MR. ROBAINA: 1.12.2 and 1.12.6, and under that it
8 gives the factual basis.

9 THE COURT: But read that regulation to me again.

10 MR. ROBAINA: "1.12.2: Authorization. Prior to
11 participating in the sale of products or services, revenue and
12 expenditure categories must be included in a programs budget
13 and approved by the governing board during the annual budget
14 adoption process or as legally changed the first year."

11:30AM

15 "1.12.6: Fees," it says, "Fees exchanged for products
16 or services produced through an educational training or service
17 activity shall be pre-approved by the governing board." And
18 then it says, "Phoenix College determined that your course
19 materials charge was not included in the adopted budget or
20 pre-approved by the governing board."

11:30AM

21 THE COURT: Yes. That looks like simply getting down
22 to the foundation of the specific finding of misconduct which
23 was with respect to the charges to the students which she was
24 ordered to refund.

11:30AM

25 MR. ROBAINA: Judge, even if you said this was part of

11:31AM

1 the cash handling procedure, then what he's doing here is
2 over -- going back to what the Board said she didn't violate.

3 THE COURT: No. That was the premise for the order,
4 the prophylactic order to give the money back, which didn't
5 require a finding that she had violated it before she was
6 insubordinate. 11:31AM

7 MR. ROBAINA: Judge, this is part --

8 THE COURT: I have labored through this. And part of
9 the challenge, and I will hear what you have to say, some of
10 this is a bit too elliptical but when digging through it it 11:31AM
11 appears that -- that's just taking the insubordination down to
12 the broader grounds of policy that supports it. But anyway, go
13 ahead. Is there anything else?

14 MR. ROBAINA: No, sir. That's a new allegation that
15 she did not get any opportunity to refute. 11:31AM

16 THE COURT: I think of it as the same allegation.
17 Anyway, go ahead, Mr. Uppal.

18 MR. UPPAL: Thank you, Your Honor. I want to keep
19 this brief.

20 Plaintiff has five causes of action. Well, actually 11:32AM
21 let's pare it down to three causes of action: A liberty
22 interest, a property interest, and a claim for declaratory
23 relief.

24 THE COURT: Well, the declaratory relief we didn't
25 talk about because that's a declaratory relief that says it's 11:32AM

1 okay for her to do what copying she wants because it does not
2 violate copyright law right.

3 MR. UPPAL: That's how I understand the plaintiff's
4 argument.

5 THE COURT: Yeah. And there's plainly no --
6 declaratory relief is discretionary, and it would be an abuse
7 of discretion to do that because, first of all, it's not
8 apparent she's doing that anymore or intends to do it anymore
9 just there's no allegation of that. And in any event, it's
10 more than sufficient for the district to say we don't have to
11 win your lawsuits. You don't get to get us into a copyright
12 case and then make us win it. It's enough for us to be
13 cautious. And so there's nothing ripe. There's not even a
14 case or controversy. And it would be abuse of discretion to do
15 it, and the allegation of underlying copyright infringement
16 does not arise here because of the district's right to manage
17 its employees so they don't get to bring them into a debatable
18 lawsuit. So this is nothing to worry about declaratory
19 judgment on the copyright.

20 MR. UPPAL: Absolutely, Your Honor. So that takes
21 care of the declaratory relief claim as Your Honor just
22 summarized. The liberty interest claims have been waived in
23 the briefing. So what we're down to is the property interest
24 claims. And the plaintiff's real quarrel here is not with a
25 lack of process. Because as you can see in the briefing as

1 well as the verbal presentation of opposing counsel, they have
2 not identified any deficient process. This is a case about, as
3 Your Honor said, constitutional minimums. And the
4 constitutional minimums have been more than satisfied. The
5 constitutional minimums here, Your Honor, are dictated by 11:34AM
6 *Loudermill* which requires nothing more than notice and an
7 opportunity to be heard as well as by *Pickering*. And I think
8 that the Supreme Court's admonition to trial courts in
9 *Pickering* is directly relevant to this case. In *Pickering*, the
10 Court said that we, quote, "must give employers wide discretion 11:34AM
11 and control over the management of their personnel and internal
12 affairs, including the prerogative to remove employees whose
13 conduct hinders efficient operation and to do so with
14 dispatch," unquote.

15 That's really what we're talking about. The plaintiff 11:35AM
16 does not like the result. The plaintiff had a full day due
17 process hearing at which she was represented by counsel, Steve
18 Montoya. She gave pre- and post-briefing.

19 THE COURT: No one accuses Mr. Montoya of being less
20 than zealous. 11:35AM

21 MR. UPPAL: Absolutely, Your Honor. But in addition
22 to an adversarial proceeding where she cross-examined -- her
23 counsel cross-examined numerous witnesses, experts were even
24 presented at this hearing. There is nothing lacking. In fact,
25 what happened here so far exceeds the constitutional minimum 11:35AM

1 that really, it is not worthy of discussion. And I don't say
2 that lightly. I think it's borne out by the fact that
3 plaintiff's counsel cannot identify what the deficiency is with
4 respect to what the constitutional bare minimum requires.

5 I would like to correct one aspect of the record,
6 however. It is not merely that plaintiff was found to be
7 willfully insubordinate in refusing to issue refunds. She, to
8 this day, remains insubordinate. I would direct Your Honor to
9 defendants' statement of facts, Paragraph 37, during the
10 deposition in this case, plaintiff was questioned as to whether
11 she had made the refunds. And bear in mind when she returned
12 after her suspension she was reminded to make the refunds, and
13 she did not do so. She still doesn't do so. But yet here she
14 is arguing that somehow due process was not satisfied.

15 So, Your Honor, I really don't have much to add to
16 your questioning of opposing counsel but to say that there is
17 no violation of a due process property interest in the
18 plaintiff's employment whatsoever. There were binding findings
19 of fact here. And the binding findings of fact by the hearing
20 committee basically reduced to down two issues: One, the
21 hearing committee recommended against suspension given that the
22 plaintiff was a 30-year tenured employee of the district.
23 That's the part that the plaintiff likes, the recommendation
24 against termination. However, the part that she wants the
25 Court to overlook is the equally binding finding that she was

1 willfully insubordinate. And the language of the finding of
2 facts by the committee was rather brutal. What they said was,
3 quote, that the plaintiff was willfully -- the plaintiff
4 willfully and intentionally failed to follow instructions that
5 were communicated to her when she failed to issue refunds to 11:37AM
6 students as directed by President Solley.

7 Everything flows from that finding of willful
8 insubordination. Your Honor's absolutely correct that the
9 issue of a neutral decision maker has been waived and forfeited
10 and was never properly pled and does not satisfy the *Iqbal*/
11 *Twombly* standards. But bearing down to a more fundamental 11:38AM
12 level, the plaintiff was stuck with that finding she was
13 willfully insubordinate. That finding of fact is binding on
14 the chancellor to --

15 THE COURT: Whether or not it was binding under the 11:38AM
16 regs themselves is a result of unquestionably richly adequate
17 procedures.

18 MR. UPPAL: Absolutely. So what happened to the
19 plaintiff is she was suspended for 14 months. She was not
20 permanently separated from employment. There was absolute just 11:38AM
21 cause for her 14-month suspension given not only the fact that
22 she -- there was a finding of willful insubordination but,
23 again, one could even argue that that 14-month suspension --

24 THE COURT: I thought it was 13 months from April to
25 May. 11:39AM

1 MR. UPPAL: That's right. It's 14 if you count
2 partial months, probably 13 months.

3 THE COURT: April 15 to May 15, wasn't it?

4 MR. UPPAL: Yes, Your Honor.

5 THE COURT: So that's 13 months.

11:39AM

6 MR. UPPAL: Absolutely, Your Honor. Perhaps that's a
7 misstatement on my part, but my point here is with the benefit
8 of hindsight that suspension probably was inadequate. Because
9 it was not enough to convey the point to the plaintiff that she
10 should actually make the refunds. She's here in the audience
11 today. She remains insubordinate. So there really can be
12 no -- there is no issue to present to the jury about inadequacy
13 of due process. All the procedures were followed. She
14 received far more than the constitutional minimum. She remains
15 insubordinate and this case, therefore, should result, I submit
16 to the Court, in summary judgment for MCCD and Chancellor
17 Glasper.

11:39AM

11:39AM

18 I have nothing else, Your Honor, unless Your Honor has
19 questions.

20 THE COURT: You know, something just occurred to me.
21 Provided that there's fair opportunity to dispute whether or
22 not she even now has not refunded the monies, either she admits
23 it or she disputes it, some adequate procedure to resolve that,
24 would the chancellor be able to suspend her again for another
25 year?

11:40AM

11:40AM

1 MR. UPPAL: Absolutely, Your Honor.

2 THE COURT: If they wanted to terminate her, of course
3 they would have to go back to the 3.15 ultimately culminating
4 in more decision making.

5 MR. UPPAL: That's right. That's absolutely correct.
6 If anything, this particular plaintiff has been treated with
7 extreme leniency by her employer. Thank you, Your Honor.

11:40AM

8 THE COURT: Any reply.

9 MR. ROBAINA: Your Honor, *Pickering* is a First
10 Amendment case.

11:41AM

11 THE COURT: What was the date on *Pickering*.

12 MR. ROBAINA: It was, I believe, 19 -- I can't
13 remember. It was a First Amendment case. It has nothing to do
14 with this type of allegation with respect to due process.

15 THE COURT: Is that the school case from 1968?

11:41AM

16 MR. ROBAINA: I believe so, *Pickering* re: something in
17 the newspapers and then was terminated.

18 THE COURT: That case was the subject of my first year
19 law school moot court case of 46 years ago. So I'm an expert
20 on that.

11:41AM

21 MR. ROBAINA: It's hard to, I guess, without restating
22 everything that we have already discussed, fundamentally, Your
23 Honor, whether or not you believe that she should be
24 disciplined because she didn't pay the \$11 back to the students
25 for the copies that she made for them, that's really not the

11:42AM

1 issue in this case. The issue in this case is whether the
2 person that brought the case against her can ultimately be the
3 arbiter of what the punishment is against her. And, you know,
4 it's a -- I think the real issue is whether or not this case
5 falls within the *Withrow* case or whether it falls outside the 11:42AM
6 *Withrow* case, the Supreme Court case. And I think there's a
7 lot of case law that indicates, look, you have situations like,
8 for instance, within the National Labor Relations Board where
9 the same agency investigates, prosecutes, and makes judicial
10 determinations but it's not the same person within those 11:43AM
11 agencies. And there's a lot of case law that talks about the
12 difference between that and the person that's making
13 allegations against someone and involved in that now becoming
14 the arbiter of whether or not -- what the punishment for
15 something like that is. 11:43AM

16 THE COURT: Is there any dispute that she was
17 insubordinate at the time of these proceedings?

18 MR. ROBAINA: No. It's binding.

19 THE COURT: And is there any dispute that even at the
20 end of the proceedings she remained insubordinate? 11:43AM

21 MR. ROBAINA: Your Honor, I'm going to answer your
22 question because you are asking me. I don't think that there's
23 any dispute regarding that. I just don't think it's relevant.

24 THE COURT: In her deposition which is after all this
25 was done, even then she remained insubordinate, right? 11:43AM

1 MR. ROBAINA: But you are putting the cart before the
2 horse here. If in this case if we did a jury trial and you did
3 everything that happens in a jury trial and then for some
4 reason you decided to retire and I was made federal judge and
5 decided this case, not that I ever would, could be, but that's
6 the same thing.

11:44AM

7 THE COURT: Ordinary personnel matters are not held to
8 the standard of judicial process.

9 MR. ROBAINA: But, Your Honor, due process has --
10 there is -- it is much more developed than what I believe you
11 are giving it credit for. They can't just have a
12 pre-disciplinary hearing with these people that are involved in
13 the --

11:44AM

14 THE COURT: Isn't it the case that she had the
15 opportunity and she took advantage of it to have every
16 pre-hearing and during hearing communication she wanted to
17 anybody including asking the Board the intervene repeatedly,
18 which they never elected to do?

11:44AM

19 MR. ROBAINA: Yes. With regard to the first part
20 that's the beginnings of due process.

11:45AM

21 THE COURT: And she had the process with the
22 administration to say anything she wanted to anybody, right?

23 MR. ROBAINA: And that's the first half of due
24 process. In the first half of due process you don't have to
25 have a neutral arbiter. It can be somebody who is not neutral.

11:45AM

1 Many times we see it because we represent law enforcement. So
2 in the beginning, they give you the allegations against the
3 police officer, for instance, and you then you go meet with the
4 sheriff or police chief or whoever. The sheriff or the police
5 chief then decides whether or not they want to go forward with
6 any allegations, and then when that's done and they do go
7 forward with it you get a full-blown evidentiary hearing for
8 somebody that's neutral.

11:45AM

9 THE COURT: How is it even rational to say that the
10 chancellor was biased when he accepted the findings of the
11 hearing committee, not to suspend -- not to terminate her.
12 That's just irrational. If you -- that's evidence of his lack
13 of bias.

11:45AM

14 MR. ROBAINA: Let me give you an example. And it's in
15 the evidence. In the notice of suspension he says, twice, in
16 the notice of suspension, he says, I'm going to suspend you for
17 14 months or you can retire.

11:46AM

18 THE COURT: In which event, she would not be suspended
19 until the end of the year. She would continue to draw a salary
20 until then.

11:46AM

21 MR. ROBAINA: What do you mean?

22 THE COURT: That was a concession.

23 MR. ROBAINA: I don't understand.

24 THE COURT: The notice that says or she can retire
25 says if she made that election then she would remain on paid

11:46AM

1 status to the end of May or middle of May or whatever as
2 opposed to having -- going on unpaid status on April 15th.
3 That's what that said. We'll leave you on, if you are going to
4 retire anyway, we'll leave you on paid status until April 15
5 instead of putting you on unpaid status.

11:47AM

6 MR. ROBAINA: The other piece of that was when they
7 put her on suspension they gave her COBRA rights.

8 THE COURT: So what?

9 MR. ROBAINA: It's not -- this is not -- you are
10 taking it -- you are giving it too much credit for --

11:47AM

11 THE COURT: Well, you made the point that they offered
12 to keep her on for an extra month if she chose to retire. I
13 don't know what you get out of that but I'm trying to correct
14 you as to what they actually did.

15 MR. ROBAINA: All I'm saying is, Judge, when you
16 are -- the -- I believe that you are suggesting that they did
17 that as a favor to her. It's not a favor to her, whereas --

11:47AM

18 THE COURT: I don't see what you are making out of
19 that. What are you making out of that?

20 MR. ROBAINA: I'm just saying they gave her a
21 suspension -- by the way, just so you know, we're talking about
22 all kinds of things that are -- that, you know, the fact that
23 it was a -- it started in April and ended in May, she's on a
24 nine-month salary which could be a 12-month salary. The real
25 ramification of that is she doesn't get paid from April until

11:47AM

11:48AM

1 fall of 2015 and she gets no benefits from April to the fall of
2 2015.

3 THE COURT: You know, my understanding about teachers
4 is they can choose to be paid on a nine-month basis or 12-month
5 basis.

11:48AM

6 MR. ROBAINA: Right. Sort of getting off --

7 THE COURT: But it's the same amount of pay for nine
8 months work, right?

9 MR. ROBAINA: Correct.

10 THE COURT: So I don't see where that's going.

11:48AM

11 MR. ROBAINA: I'm just saying this is not an -- I'm
12 losing track of my -- it's getting long.

13 But this is a due process case and they have to have
14 fair due process. You have to have a fair and impartial
15 decision maker at not just the fact-finding stage but also the
16 decision making stage. That's what's lacking here, Judge. And
17 it's clear the due process has been very, very developed. It's
18 not just the fact that she got to -- that she took it upon
19 herself to try to get the Board to do something. That doesn't
20 mean that somehow they gave her due process.

11:48AM

11:49AM

21 THE COURT: They don't owe her any process. The
22 process was owed at the administration and chancellor level and
23 she got all that. The Board didn't have to intervene. She had
24 the opportunity to ask them to intervene. She argued twice and
25 wrote letters. That has nothing to do with due process because

11:49AM

1 they don't owe her anything constitutionally or under state
2 law.

3 MR. ROBAINA: Constitutionally, they owe her the right
4 to a neutral arbiter. The fact that they wouldn't give her
5 somebody.

11:49AM

6 THE COURT: Whenever we deal with an issue you slip to
7 something else.

8 Anyway, I think I'd like to go to a retirement lunch
9 for a lawyer over at the prosecutor -- at the U.S. Attorney's
10 Office and we have had an hour and 45 minutes. Been going a
11 long time, hour and 15 minutes.

11:49AM

12 So very well. The motions are taken under advisement.
13 One thing I learned from this is I'm going to put in my case
14 management order that simultaneous cross motions are not
15 allowed. If both sides want to file motions, they should
16 confer as to who will go first and everybody gets two briefs.
17 And if they can't agree I would have the plaintiff go first.

11:50AM

18 Motions are taken under advisement. And we'll be in
19 recess.

20 (Proceeding concluded at 11:50 a.m.)

11:50AM

C E R T I F I C A T E

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 9th day of January, 2018.

s/Laurie A. Adams

Laurie A. Adams, RMR, CRR